

July 28, 2005

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**Re: Your Request for Advice**  
**Our File No. A-05-137**

Dear Ms. Battersby:

This letter is in response to your request on behalf of Penny Lilburn, a member of the city council of the City of Highlands for advice regarding conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### **QUESTIONS**

1. May Councilwoman Lilburn participate in a governmental decision to provide funds to the Senior Center of which she is the Executive Director and a management employee?
2. May Councilwoman Lilburn participate in governmental funding decisions that may affect other organizations?
3. May Councilwoman Lilburn participate in governmental decisions involving a party who is a major donor to the Senior Center from which she receives income?
4. What are Councilwoman Lilburn's reporting and disclosure obligations relating to donations made by a party to the Senior Center from which she receives income?

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

## **CONCLUSIONS**

1. No. Councilwoman Lilburn has a conflict of interest and must disqualify herself from participating in governmental decisions that may financially affect the Senior Center.
2. No. Councilwoman Lilburn may not participate in governmental decisions that may affect other organizations, unless those decisions will not have a reasonably foreseeable material financial effect on the Senior Center.
3. Yes. Councilwoman Lilburn may participate in governmental decisions involving a party who is a major donor to the Senior Center, provided that she does not solely control the Senior Center, the donations do not constitute a significant portion of the salary that she receives from the Senior Center, and the donations are not directed to her as an individual officer or employee of the Senior Center.
4. Councilwoman Lilburn is not required to report or disclose donations to the Senior Center from which she receives income, provided that the donations are given to the Senior Center for its use, she does not solely control the Senior Center, the donations do not constitute a significant portion of the salary that she receives from the Senior Center, the donations are not directed to her as an individual officer or employee of the Senior Center, and the donations are for purposes unrelated to her candidacy.

## **FACTS**

The city of Highland (the "City") is a general law city located in San Bernardino County. Councilwoman Lilburn was elected to the City Council in January 2004, and was re-elected in November 2004 for a four-year term.

Councilwoman Lilburn is the Executive Director and a management employee of the Highland District Council on Aging, Inc., a nonprofit corporation, and the Highland Senior Center (the "Senior Center"). Lilburn was appointed to her position by a 20-member Board of Directors. The City is a recipient of Community Development Block Grant ("CDBG") funds. Annually, the City awards CDBG funds to a number of non-profit organizations. Over the last ten years, the city council has awarded a portion of its CDBG funds to the Senior Center. During her term of office, Councilwoman Lilburn has not participated in such decisions. She has abstained from participation in all CDBG funding decisions, including the decision directly affecting the Senior Center and also the general discussion and decisions regarding CDBG fund distribution to other organizations. She would like formal advice from the Commission prior to the next funding cycle as to whether she may participate in a decision to provide CDBG funds to the Senior Center, and as to whether she may participate generally in the City's CDBG funding decisions affecting other organizations. The council is scheduled to begin reviewing CDBG funding applications in November 2005.

The Senior Center has a budget of approximately \$400,000 per year, which is funded primarily by revenues from the Arrowhead United Way Agency, CDBG funds allocated by the City and other local agencies, a grant from the Department of Aging and Adult Services, membership dues and programs, fundraising events and private individual and business donations. Recently, the Senior Center received a substantial donation from the San Manuel Band of Mission Indians (the “Tribe”). The Tribe has a pending land use application in the City, which is expected to come before the city council in the near future. Councilwoman Lilburn would like advice from the Commission as to whether she may participate in the decision regarding the Tribal land use application. The Tribe has an application pending before the City’s Planning Commission, which (if appealed), will come before the city council within the next three months.

### **ANALYSIS**

The Act requires that public officials “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) The Act prevents conflicts of interest in two ways - by disqualification and by disclosure. (Sections 87100-87350.)

#### **Disqualification**

As a public official, Councilwoman Lilburn is prohibited from playing any role in a governmental decision in which she has a financial interest. (Section 87100; Regulation 18700(a).) Within the meaning of the Act, Councilwoman Lilburn has a “financial interest” in a governmental decision if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of her economic interests. (Section 87103; Regulation 18700(a).) If the material financial effect is reasonably foreseeable, and no exception applies, Councilwoman Lilburn has a disqualifying conflict of interest and must recuse herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100. (Section 87105; Regulation 18702.)

The Commission has adopted an eight-step standard analysis for determining whether an official has a disqualifying conflict of interest. (Section 87100; Regulation 18700, subdivisions (b)(1) - (8).)

#### **Step One: Is Councilwoman Lilburn a Public Official?**

As an elected Councilwoman for the City of Highland, Ms. Lilburn is a “member, officer, employee or consultant of a state or local government agency” and therefore, she is a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; Regulation 18701.)

**Step Two: Will Councilwoman Lilburn Make, Participate in Making, or Use or Attempt To Use Her Official Position To Influence a Governmental Decision?**

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without substantive review, the official negotiates with, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Section 87100; Regulation 18702.2.) A public official “attempts to use his or her official position to influence a decision before his or her own agency” if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3.)<sup>2</sup>

The information that you provided indicates that Councilwoman Lilburn will participate in the governmental decisions in question.

**Step Three: What Are Councilwoman Lilburn’s Economic Interests?**

A public official may have an economic interest in any of the following:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more in fair market value. (Section 87103(b); Regulation 18703.2.)
- Any source of income to him or her, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in any source of gifts to him or her, if the gifts aggregate to \$360 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

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<sup>2</sup> If a public official's office is listed in section 87200 (“87200 filers” include members of city councils) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105). These requirements are applicable to Councilwoman Lilburn if she has a conflict of interest in a governmental decision.

- His or her personal finances, including those of his or her immediate family. (Section 87103; Regulation 18703.5.)

Councilwoman Lilburn has an economic interest in any organization from which she has received income aggregating to at least \$500 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); Regulation 18703.3(a)(1).) Section 82030 defines “income” broadly as any “payment received.” Section 82044 defines “payment” as any “payment, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.” The information that you provided indicates that Councilwoman Lilburn is an employee of the Senior Center. You have not disclosed the amount of income that she receives from that employment. Nonetheless, we will assume that she receives at least \$500 in income from the Senior Center within a 12-month period, and that the nonprofit is thus a “source of income” to her. (Section 87103(c); Regulation 18703.3(a)(1).) Since we assume that Councilwoman Lilburn has an economic interest in the Senior Center, we continue our analysis to determine whether that economic interest requires her to disqualify herself from governmental decisions that may affect the Senior Center.

Councilwoman Lilburn may also have an economic interest in the Tribe because the Tribe made a substantial donation to the Senior Center from which she receives income. In particular circumstances, donations or payments to an official’s employer may be imputed to the official. However, such an outcome has generally been deemed appropriate in particular circumstances, such as where the official solely controls the nonprofit entity (See *Priamos* Advice Letter, No. A-04-191), where the donation constitutes a significant portion of the salary that the official receives from the nonprofit entity (See *Shaw* Advice Letter, No. A-87-045), or where the donation is directed to the official as an individual officer or employee of the nonprofit entity (See *O’Shea* Advice Letter, No. I-90-593). The information that you provided does not indicate that any of these circumstances exist in Councilwoman Lilburn’s situation. As we understand the facts, Councilwoman Lilburn does not have an economic interest in the Tribe, and may participate in governmental decisions that may affect the Tribe.

#### **Step Four: Are Councilwoman Lilburn’s Economic Interests Directly or Indirectly Involved in The Governmental Decisions?**

A person, including a source of income, is directly involved in a decision before an official’s agency when that person either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial

or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Section 87100; Regulation 18704.1(a).)

Information that you provided indicates that the Senior Center would be the subject of the governmental funding decisions before Councilwoman Lilburn. Therefore, the Senior Center would be directly involved in the governmental decisions.

The Senior Center would be an indirectly involved nonprofit entity in funding decisions involving other nonprofit organizations.

### **Step Five: Is The Financial Effect on Councilwoman Lilburn’s Economic Interest Material?**

*Any reasonably foreseeable financial effect on a person, including a nonprofit entity, who is a source of income to a public official, and who is directly involved in a decision before the official’s agency, is deemed material. (Emphasis added.)* (Section 87103; Regulation 18705.3, see Section 82047 [defining “Person”].) Accordingly, if the directly involved funding decisions will have *any* financial effect on the Senior Center, that effect will be deemed material.

For an indirectly involved nonprofit entity that is a source of income to Councilwoman Lilburn, the financial effects on her economic interest are material if the decision will have a particular financial result on her economic interest, where the particular financial result is based on the nonprofit entity’s gross annual receipts. (Section 87103; Regulation 18705.3(b)(2).) For example, according to regulation 18705.3(b)(2)(F):

“For an entity whose gross annual receipts are \$100,000 or less, the effect of the decision will be any of the following:

“(i) The decision will result in an increase or decrease of the entity’s gross annual receipts for a fiscal year in the amount of \$10,000 or more.

“(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.

“(iii) The decision will result in an increase or decrease in the value of the entity’s assets or liabilities in the amount of \$10,000 or more.”

You have not provided information about the Senior Center’s gross annual receipts, so we cannot further analyze this question.

**Step Six: Is The Financial Effect of The Decision on Councilwoman Lilburn's Economic Interest Reasonably Foreseeable?**

A material financial effect upon an economic interest is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Section 87103; Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) The information that you provided indicates that the decision concerning whether the City will award CDBG funds to the Senior Center will have a material financial effect on the Senior Center. Since it is reasonably foreseeable that the decision concerning the Senior Center will have a material financial effect on the Senior Center, Councilwoman Lilburn is disqualified from playing any role in the matter unless an exception applies.

The information that you provided also indicates that decisions concerning the award of CDBG funds to other nonprofit organizations may have a reasonably foreseeable material financial effect on the Senior Center indirectly. For example, if the City first decided to award funds to other nonprofit organizations, a material financial effect on the Senior Center from the prior decision(s) might be reasonably foreseeable since the funds available to the Senior Center might depend on the outcome of the former funding decisions. In this situation, Councilwoman Lilburn would be disqualified from playing any role in any of the funding decisions, unless an exception applied.

However, if the City first decided to award funds to the Senior Center, a material financial effect on the Senior Center would not be reasonably foreseeable since the decision as to the Senior Center would not depend on the outcome of the other decisions. In this situation, Councilwoman Lilburn would be disqualified from the decision concerning the Senior Center, but she would not be disqualified from funding decisions concerning other nonprofit organizations. Whatever the City’s decision-making process, Councilwoman Lilburn should not play any role in any decision that is substantially likely to have a material financial effect on the Senior Center.

**Steps Seven & Eight: Public Generally & Legally Required Participation Exceptions**

Even if a decision would have a reasonably foreseeable material financial effect on one or more of the official’s economic interests, he or she may still participate in the decision if the effect is not distinguishable from the effect on the public generally. (Section 87103; Regulation 18707.) However, the information that you provided does not suggest that the “public generally” exception would apply to the decision in question.

Additionally, an official may be called upon to participate in a decision despite the fact that he or she may have a disqualifying conflict of interest. This “legally required participation” exception applies only in particular circumstances where the relevant governmental agency would be otherwise paralyzed from acting. (Section 87101; Regulation 18708.) You also have not indicated that this exception would apply to the decision in question.

Disclosure

The Act requires that Councilwoman Lilburn report campaign contributions that she receives and file periodic statements of economic interests disclosing her investments, her interests in real property, and income that she receives. (Section 84100; Section 87200.) Nonetheless, the Act generally does not require that officials report donations received by nonprofit entities, such as where the donations are given to the nonprofit entity for its use (*In re Nejedly* (1976) 2 FPPC ops. 46), so long as the official does not solely control the nonprofit entity (See *Priamos* Advice Letter, No. A-04-191), the donation does not constitute a significant portion of the salary that the official receives from the nonprofit entity (See *Shaw* Advice Letter, No. A-87-045), the donation is not directed to the official as an individual officer or employee of the nonprofit entity (See *O'Shea* Advice Letter, No. I-90-593), and the donation is for purposes unrelated to the official's candidacy (See *Priamos* Advice Letter, No. A-04-191). The information that you provided indicates that these circumstances exist in Councilwoman Lilburn's case. As we understand the facts, Councilwoman Lilburn is not required to report or disclose the Tribe's donation to the Senior Center from which she receives income.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By: Crystal Muhlenkamp  
Intern, Legal Division

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